

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	
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	:	DECISION OF THE
vs.	:	
	:	VICE COMMANDANT
LICENSE NO. 661678	:	
	:	ON APPEAL
	:	
Issued to: John M. Wayman, Appellant	:	NO. 2577
	:	

This appeal is taken in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

By order dated April 18, 1994, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, issued an admonition to Appellant based upon finding proved charges of *negligence* and *misconduct*. The single specifications supporting each charge allege that on or about August 13, 1993, while serving as master of the M/V RIVER QUEEN, Appellant negligently (Charge I) and wrongfully (Charge II) allowed the vessel to be under the direction and control of an unlicensed individual in violation of 46 C.F.R. 15.515(b).

Following a prehearing conference on February 1, 1994, the hearing was held at Seattle, Washington, on March 15, 1994. At the hearing, Appellant was represented by professional counsel and entered a response denying all charges and specifications.

The Coast Guard Investigating Officer introduced into evidence five exhibits and the testimony of one witness. In defense, Appellant offered into evidence four exhibits and the testimony of four witnesses, including himself.

After the hearing, the Administrative Law Judge issued a Memorandum Ruling on Proposed Findings of Fact and Conclusions of Law and Order (MR&O). He then rendered a

decision which concluded that the charges and specifications were found proved. On April 18, 1994, the Administrative Law Judge issued a written order admonishing the Appellant's conduct under License No. 661678. The Appellant retained his license. The order was served on April 19, 1994. Appellant filed a timely appeal on May 19, 1994. Therefore, this appeal is properly before me for review.

APPEARANCE: Appellant, *pro se*.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned License. Appellant's License authorized service as a master on inland steam and motor vessels of not more than 100 gross tons. On August 13, 1994, two Coast Guard investigators, following up on a tip, booked passage on the small passenger vessel M/V RIVER QUEEN to observe the conduct of the master, the Appellant in this case. The M/V RIVER QUEEN is a dinner cruise vessel with two enclosed levels. The wheelhouse is located forward of the upper enclosed level. Mr. Wayman was the only person on board the vessel required to hold a license.

The investigators, Lieutenants Perez and Stueve, took note of Appellant's whereabouts for the first half of the voyage, approximately 1.5 hours. During this entire time, the vessel was piloted by Mr. Chuck Roe, an unlicensed individual. Lieutenant Perez observed Appellant away from the wheelhouse for an aggregate time of approximately one hour, during which he was observed tending lines, conversing with some of the over 100 guests on board, and serving coffee. On two occasions, Appellant was inside the lower deck area where he could not readily observe or communicate with other vessels or the unlicensed operator in the wheelhouse. While he was inside the lower deck area, the vessel passed through two swing bridges while transiting through

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Ebey Slough, a narrow and curving waterway. After these observations, the Coast Guard Investigators determined that Appellant was not maintaining direction and control of the vessel in accordance with 46 C.F.R. 15.515(b) and directed him to remain in the wheelhouse for the second half of the voyage, which he did.

At the hearing, there was conflicting testimony as to the exact time Appellant was on the lower enclosed deck. The Administrative Law Judge did not make a finding concerning this matter. Instead, he accepted the testimony of Lieutenant Perez that Appellant was absent from the wheelhouse for an aggregate of one hour before he was directed to return to the wheelhouse.

BASES OF APPEAL

Appellant asserts that the Administrative Law Judge committed "clear errors" by: 1) rejecting certain of Appellant's proposed findings of fact, and 2) accepting the testimony of Lieutenant Perez as credible.

OPINION

I

Appellant asserts that the denial of certain of his proposed findings of fact is inconsistent with the record. I disagree. From Appellant's brief, what appears to underlie this assertion is a misconception that once the Administrative Law Judge accepts an item of evidence into the record, it must later be adopted as a finding of fact. On the contrary, a function of the Administrative Law Judge is to render findings based on *all* the evidence in the record. *See* 46 C.F.R. 5.563. A finding of fact need not be consistent with all the evidence in the record as long as sufficient material exists in the record to support the finding. Appeal Decisions 2395 (LAMBERT); 2282 (LITTLEFIELD); 1964 (COLON).

When the Administrative Law Judge rejects a proposed finding of fact, the opposite of that finding is not necessarily accepted, absent a specific finding to that effect. The Administrative Law Judge rejected Respondent's Proposed Findings of Fact 9, 11, 12, and 13, which all concern the amount of time Appellant was on the lower deck of the M/V RIVER QUEEN. [MR&O at 4]. In essence, these proposed findings conclude that Appellant was only on the lower deck for a brief period. The Appellant infers from this rejection that the Administrative Law Judge accepted the Investigating Officer's contention that Appellant was on the lower deck at one period for 10-15 minutes. However, the Administrative Law Judge made no specific finding concerning the exact amount of time Appellant spent on the lower deck, and none is required to prove the negligence or misconduct charge. Appeal Decision 2122 (RODIEK). It is sufficient that the Administrative Law Judge found that Appellant, due to his absence from the wheelhouse, relinquished direction and control of the M/V RIVER QUEEN to an unlicensed individual. [Decision & Order (D&O) at 7].

Appellant also contends it was error to reject his proposed findings that the vessel was not in any danger because the "voyage proceeded without a casualty and without incident," and that he therefore acted in a "reasonably prudent" manner. [MR&O at 4]. Such findings are irrelevant to these proceedings because neither regulation nor my prior decisions require a marine casualty as an antecedent to finding proved charges of *negligence* or *misconduct*. 46 C.F.R. 15.515(b); Appeal Decision 2166 (REGISTER); *See also* 46 C.F.R. 5.27, 5.29 (definitions of "misconduct" and "negligence"). The Administrative Law Judge found that, based on the circumstances of the voyage, Appellant's actions compromised the safety of the vessel and the passengers. [D&O at 14-15; MR&O at 7].

The determination of weight of the evidence is solely the province of the Administrative Law Judge. His findings will not be overturned on appeal unless they are without support in the record or inherently incredible. Appeal Decisions 2542 (DEFORGE), 2424 (CAVANAUGH), 2423 (WESSELS), 2422 (GIBBONS). After review of the record, I find that sufficient evidence

exists to support the findings of the Administrative Law Judge and his rejection of Appellant's proposed findings.

II

Appellant asserts in general that the testimony of Lieutenant Perez is inconsistent and incredible. I disagree. It is well established that questions involving the credibility of a witness are best decided by the Administrative Law Judge who presides at the hearing. Appeal Decisions 2017 (TROCHE), *aff'd* NTSB Order No. EM-49 (1976); 2253 (KIELY); 2279 (LEWIS); 2290 (DUGGINS). The Administrative Law Judge's determination will be upheld absent a demonstration that he was arbitrary or capricious. *Id.*

The Administrative Law Judge found that Lieutenant Perez's testimony was credible. [D&O at 6]. Further, Lieutenant Perez's testimony about the total amount of time Appellant was away from the wheelhouse was "clear, consistent and devoid of any major inconsistencies." [D&O at 15]. Appellant offers no evidence to refute this finding and I find nothing in the record.

Appellant paints an incomplete picture of the record by asserting that Lieutenant Perez incorrectly testified that he saw Appellant inside the lower deck during the passage through the two swing bridges. While it may be true that from his position on the upper deck, Lieutenant Perez could not physically see Appellant inside the lower deck, the essence of Lieutenant Perez's testimony indicates that Appellant was neither topside nor on the exposed forward deck area during the passage through the two swing bridges. [TR at 29-30, 40-41]. Therefore, based on the evidence of the configuration of the M/V RIVER QUEEN, the Administrative Law Judge found that the only place Appellant could be during this period was inside the lower deck. [TR at 17-21; MR&O at 6]. This is consistent with Appellant's own testimony. [TR at 116, 118]. Appellant also criticizes parts of Lieutenant Perez's testimony that have no bearing on the fact

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that Appellant was away from the wheelhouse; the fact that Lieutenant Perez could not recall the actual time of darkness or the proper name for the body of water the M/V RIVER QUEEN departed from does little to convince me that he did not competently testify as to Appellant's absence from the wheelhouse.

In summary, I do not find the credibility determinations of the Administrative Law Judge to be arbitrary or capricious.

III

Although not raised by Appellant, I note that the charges of *misconduct* and *negligence* emanate from the same conduct. The Administrative Law Judge properly considered the multiplicity of the charges in awarding the sanction in this case. [D&O at 16].

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with applicable laws and regulations.

ORDER

The Decision and Order of the Administrative Law Judge, dated April 18, 1994, is
AFFIRMED.

R. D. HERR
Vice Admiral, U.S. Coast Guard
Vice Commandant

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Signed at Washington, D.C. this 10th day of July, 1996.